

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In the Matter of )  
 )  
Amendment of Rules Governing ) CC Docket No. 92-26  
Procedures to Be Followed When )  
Formal Complaints Are Filed Against )  
Common Carriers. )

NOTICE OF PROPOSED RULEMAKING

Adopted February 13, 1992; Released March 12, 1992

Comment Date: April 21, 1992  
Reply Comment Date: May 11, 1992

By the Commission: Commissioner Barrett issuing a separate statement.

**INTRODUCTION**

1. This Notice of Proposed Rulemaking solicits comments on proposed changes to our rules regarding the procedures applied to formal complaints against common carriers.<sup>1</sup> Our goal in initiating this proceeding is to facilitate timelier resolution of formal complaints by eliminating procedures and pleading requirements that have caused unintended and unnecessary delays. This Commission is committed to the expeditious resolution of formal complaints. Unfortunately, our current procedures, particularly those pertaining to discovery, have often operated to prolong rather than expedite resolution. Given this Commission's reliance on the complaint process to resolve many pricing and other disputes between customers and common carriers, we must seek new ways to expedite disposition of formal complaints. Therefore, we propose the following changes to our rules -- changes designed to ensure just, fair and timely resolutions of formal complaints. Generally, we propose to modify filing deadlines, eliminate certain pleading opportunities which do not appear useful or necessary, and modify and consolidate the discovery process. Although rule changes cannot address all factors affecting speed of resolution for all cases (e.g., staffing and other resource limitations, case complexity, other litigation related issues), the revisions we propose herein are intended to reduce delay by encouraging more concise and thorough pleadings and by minimizing the protracted disputes over discovery issues that have, in some cases, overtaken proceedings.

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1 These rules are found at 47 C.F.R. §§ 1.720-1.734.

## BACKGROUND

2. Section 208 of the Communications Act permits any party to file a complaint against a common carrier for acts or omissions in violation of either the Communications Act or a Commission rule or order. 47 U.S.C. § 208. Formal complaint proceedings are similar to litigation conducted in a court but are generally decided solely on the basis of written pleadings and evidence rather than through trial-type procedures. Our rules specifying pleading requirements and procedures applied in formal complaint cases were last revised nearly four years ago. Amendment of Rules Governing Procedures to Be Followed Where Formal Complaints Are Filed Against Common Carriers, Report and Order, 3 FCC Rcd 1806 (1988) (1988 Formal Complaints Rules Revision). That major revision set explicit requirements with respect to the content of pleadings, incorporated informal practices regarding briefs and settlement conferences into the rules, and introduced discovery.

3. Under our rules as presently framed, formal complaints are served by the Commission on the defendant, who must either satisfy the complaint or file an answer within 30 days. A reply to the answer may be filed by the complainant within ten days from the date the answer is served. Although this pleading is voluntary under the current rules, a complainant's failure to reply to affirmative defenses presented in an answer is deemed to be an admission of any facts alleged. Throughout the formal complaint process, the parties may file motions requesting Commission orders addressing a wide variety of procedural and substantive matters. The only restriction with respect to the timing of motions regards requests that the allegations in a complaint be made more definite and certain; such motions must be filed within 15 days after service of a complaint by the Commission. Oppositions to motions may be filed within ten days from the date of service and replies to oppositions are due within five days after the time for filing oppositions has expired.

4. Currently, both the complainant and defendant in formal complaint actions may engage in discovery. Each party has an opportunity to address up to 30 single interrogatories seeking nonprivileged information relevant to the proceeding from the opposing party. Such interrogatories may be served during the time period beginning with service of the complaint and ending 30 days after the date a reply is due to be filed. Answers or objections to interrogatories are due 30 days after service of the interrogatories, except for a defendant who may respond within either the specified 30 day period or 15 days after its answer to the complaint is filed, whichever date is later. If a party receiving interrogatories fails to respond or has objected, the party propounding the interrogatories has 15 days from the date objections were served or responses were due to move to compel a response. Other forms of discovery, such as the production of documents and the taking of depositions, as well as additional interrogatories beyond the limit of 30, are available only if so ordered by the Commission. Parties may file motions seeking such discovery orders. Oppositions to such motions are due in the normal 10 day time frame applied to all motions. However, replies to oppositions to discovery motions are not permitted.

5. At any time, the Commission may require parties to file additional briefs addressing legal issues and summarizing the pleadings and other record evidence. In addition, the Commission calls status conferences to narrow the issues, obtain stipulations of fact, assess the sufficiency of the record, plan discovery, pursue settlement, or conduct other discussions for the purpose of promoting progress in the case.<sup>2</sup>

## DISCUSSION

6. The Commission's stated goals in adopting the current procedural rules were "to promote the creation of a better and more complete record for the disposition of formal complaints, to improve the speed of resolving such complaints, and to clarify and simplify the present rules." 1988 Formal Complaints Rules Revisions, 3 FCC Rcd at 1806. After almost four years of experience with addressing formal complaints under the current rules, however, we believe that certain modifications are needed to facilitate timelier resolution of these complaints. In some instances, the current rules permit parties to file unnecessary pleadings and needlessly prolong the discovery process, thereby frustrating prompt disposition of complaints. Moreover, in 1988, after the current rules were adopted, Congress amended Section 208 to require that those complaints challenging the lawfulness of "a charge, classification, regulation or practice" are to be resolved within 12 months of filing, 15 months if the case involves facts of "extraordinary complexity." 47 U.S.C. § 208(b); Federal Communications Commission Authorization Act of 1988, Pub. L. No. 100-594, 102 Stat. 3021 (Nov. 3, 1988). The Commission works very hard to comply with this statutory mandate. The unnecessary delays which frequently occur under the present rules become even more troublesome in light of the time constraints imposed by the statutory amendments.

7. Therefore, after examining procedures, rule requirements and case histories, it appears to us that the formal complaint process can be expedited and simplified by modifying filing deadlines, eliminating apparently unnecessary pleading opportunities, and modifying and consolidating the discovery process. The specific provisions proposed herein would revise our rules accordingly. We believe that these proposed rule changes will result in a net benefit to the public, the parties, and the Commission. By achieving a full and sufficient record more promptly and by eliminating the incentive for parties to file redundant pleadings or engage in protracted discovery, the Commission should be able to resolve formal complaints in a more timely manner. We invite interested persons to comment on our proposals and to identify any other revisions that might assist in achieving our goal of timely resolution of formal complaints. The full text of the proposed rules is set forth in the attached Appendix.

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<sup>2</sup> Further, the Commission has decided to develop a pilot project to explore the potential of alternative dispute resolution (ADR) techniques in the Section 208 formal complaint context. The Commission has stated that it will encourage the parties at settlement conferences to consider the use of ADR procedures to resolve formal complaints. Initial Policy Statement and Order, 6 FCC Rcd 5669, 5670 (1991).

## Pleadings

8. We propose to reduce the permissible time for a defendant to file an answer to a complaint from 30 to 20 days from date of service. We note that the new proposed deadline for an answer to a complaint coincides with that required under the federal rules governing litigation in court. Federal Rules of Civil Procedure, Rule 12(a).<sup>3</sup>

9. We also propose to introduce time limits for filing briefs when such additional submissions are required by the Commission to supplement or consolidate the record. The current rule authorizing the Commission to require the filing of briefs does not establish any time frame for their submission. In cases where the Commission or its staff orders the submission of briefs but does not permit discovery, we propose to require that briefs be filed concurrently by the complainant and defendant within 15 days from the date the staff orders submission of such a pleading, unless otherwise stated.<sup>4</sup> Such briefs would be limited to no more than 25 pages. In cases where discovery has been conducted, we propose to set the filing deadline for both defendant and complainant at 20 days from the date the staff orders submission of such a pleading, unless otherwise stated. We propose that reply briefs be permitted only in such cases where discovery has been conducted. These reply briefs, again to be filed concurrently by both parties, would be due within ten days from the filing deadline for initial briefs. We propose that in cases where discovery has been conducted, initial briefs be limited to 35 pages and reply briefs to 20 pages, unless otherwise specified by the staff. These provisions should assure uniformity and consistency with respect to briefs filed in formal complaints cases.

10. Another significant change with respect to the pleadings filed in formal complaint cases involves the proposed revision of Section 1.726, which currently permits a complainant to reply to a defendant's answer to a complaint. Under the present rule, filing a reply is voluntary and failure to reply is not deemed to be an admission of any allegation contained in the answer, except with respect to any facts included in affirmative defenses contained in the answer. We have found that in most cases, replies do not significantly aid the Commission in resolving factual or legal issues in the formal complaint context and often simply repeat arguments made in the original complaint. In other instances, replies have been used to offer information or explanations that should have been presented initially in the complaint. Therefore, we propose to eliminate replies except in those cases where an answer to a complaint presents affirmative defenses that are

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3 Although we do not find it necessary, or even preferable, to model our formal complaint rules precisely upon federal rules of civil procedure, the federal rules may provide useful guidance in certain instances.

4 We propose that the staff be permitted, during status conferences, to order orally that briefs be submitted. Any such orders would be promptly memorialized in writing and served on the parties.

factually different from any denials also contained in the answer.<sup>5</sup> Limiting a complainant's opportunity to file a reply to such a particular circumstance should expedite resolution of complaints without threatening either the development of a complete record or a complainant's ability to plead a case. If replies are not allowed, the complainant will have an increased impetus to produce a complaint that reflects the nature and facts of a controversy completely and accurately and avoids unnecessary delay in responding to the complaint. Although our current rules require the inclusion of specific facts and legal authorities upon which a complaint is based, we have observed that complaints often do not contain the level of factual support or legal analysis we consider to be appropriate in establishing a record for resolution.<sup>6</sup> In fact, it appears that in some instances, complainants are filing marginally acceptable complaints to initiate a proceeding, apparently counting on establishing the basic factual underpinnings of their case through subsequent pleadings or discovery. Such practices unnecessarily complicate and prolong the formal complaints process. Terminating the right of a complainant to file a reply would operate to encourage full compliance with our rules regarding the level of detail that should be offered in support of a complaint. Factual or legal controversies that require elucidation beyond that contained in the complaint and answer can be addressed by the parties through discovery or in briefs as called for by the Commission.

11. We are also proposing new restrictions applicable to the submission of motions to specify that no motions are to be filed until the time an answer is due, except when a complainant moves for dismissal. Presently, motions to make a complaint more definite and certain are to be filed within 15 days after service of a complaint. Other motions can be filed any time during the pendency of a case at the discretion of the movant. We now propose to require that motions to make a complaint more definite and certain be filed with the answer which must, notwithstanding the motion, respond to those allegations that can reasonably be addressed. Similarly, a defendant's motion seeking dismissal or summary judgment must be filed with the answer, unless it is based upon information discovered after the deadline for filing the answer and clearly so states, identifying the particular information and the occasion of its discovery. As is currently allowed, oppositions to motions could be filed within ten days after the motion is filed. We propose to state more explicitly that oppositions to motions may address only those issues raised by the motion. Thus, when a motion is incorporated in an answer, the opposition to the motion cannot address issues presented in the answer that are not also specifically raised in the motion. Finally, consistent with our proposal to no longer permit the

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5 In addition, if the answer contains a cross-complaint, the complainant may file an answer in accordance with the rules regarding such pleadings.

6 As a related matter, we propose to add a provision applicable to all pleadings in formal complaint cases requiring that any statements purporting to summarize or explain Commission orders or policies must cite, in standard legal form, the Commission ruling upon which such statements are based.

filing of replies to answers in formal complaint proceedings, we are also proposing that replies to oppositions to motions similarly be disallowed in the formal complaint arena. The proposed restrictions regarding motions should ensure that relevant information is immediately presented to the Commission while also curbing the proliferation of motions and their responsive pleadings that either address a variety of procedural issues of minimal significance or repeat substantive allegations contained in major pleadings.<sup>7</sup>

12. Finally, we propose to add a rule explaining that, pursuant to Section 1.1105(1)(c), fees must be paid by parties filing formal complaints. This new rule would expressly state that when a complaint is against multiple defendants, separate fees must be paid for each named defendant. This rule should assist parties who may not be aware of fee requirements already adopted by this Commission, under statutory mandate,<sup>8</sup> since the last revision of the formal complaint rules.

### Discovery

13. We propose to change the discovery mechanisms encompassed by our rules in several significant respects. Although we believe that the benefits of limited self-executing discovery through interrogatories, with other forms of discovery permissible only with Commission approval, are substantial and should be preserved, we propose to change somewhat the scope, procedures and timing associated with these discovery tools in an effort to minimize unnecessary delay caused by protracted discovery.<sup>9</sup> To

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7 The proliferation of redundant motions should also be affected by elimination of replies, as outlined above. The frequency of motions that essentially repeat allegations made in other pleadings in a case should be diminished, since such filings would permit the opposing party an opportunity to respond that would not have been available absent the motion. For instance, under our proposed structure eliminating replies, the complainant would not respond to the defendant's answer. However, if the defendant filed a motion seeking dismissal or summary judgment simply repeating the allegations and defenses contained in its answer, the complainant would have the right to respond in an opposition to the defendant's motion. Presumably, parties would want to avoid providing opposing counsel an extra opportunity to promote their case and, accordingly, forego filing repetitive motions that offer no bases for resolution of the complaint other than those already fully presented in other pleadings.

8 47 U.S.C. § 158; Omnibus Budget Reconciliation Act of 1989, Pub. L. 101-239, 101 Stat. 2106 (1989).

9 We have also found that discovery is not always necessary to compile an adequate record for resolution of all formal complaint cases, particularly at the liability phase of the proceeding. We seek comment on whether a rule precluding discovery, including interrogatories, absent an affirmative order by the staff would

limit delay often associated with the scope and magnitude of discovery, we propose that, unless otherwise directed by the staff, no discovery regarding alleged damages be permitted until after an initial finding of liability by the Commission, thus bifurcating the proceeding. We seek comment on this proposal, particularly whether substantial benefits would be realized by such a bifurcated approach. Our experience handling formal complaints has shown that a significant amount of the parties' discovery efforts often center around developing facts that would prove or disprove injury or damages incurred as a consequence of a violation of the Communications Act or Commission requirements. The time and effort expended by the parties and the staff on such discovery is effectively wasted if no violation or liability is found.<sup>10</sup> Nevertheless, we are aware that requiring the parties to litigate damage claims in a bifurcated proceeding could result in the expenditure of considerable additional time and resources of the parties and the staff. One possible way to minimize this burden would be to establish, following a finding of liability, a limited period during which the parties could engage in settlement negotiations or submit their damage claims to voluntary alternative dispute resolution mechanisms prior to further proceedings on damages, including any referral to an Administrative Law Judge. We ask interested parties to comment on the benefits, if any, that would be realized by implementation of this approach as a separate phase of the proceeding. We also encourage commenters to submit alternative proposals that would serve to minimize or reduce the need for costly and protracted proceedings on the issue of damages.

14. We also propose to change the discovery timetable in other respects. Parties may now initiate discovery during the time period beginning with service of the complaint and ending 30 days after the date a reply is due to be filed. We propose to shorten the time available to initiate discovery so that no requests for discovery, including self-executing interrogatories, would be served either before an answer is due, or more than 20 days after such date, unless otherwise directed by the staff. This should ensure more focused, effective discovery requests by the parties. Likewise, any requests for production of documents or other discovery initiatives would have to be pursued within this same time frame. Answers to interrogatories and requested documents would be due within 20

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serve to expedite the complaint process without adversely affecting the parties. We encourage commenters to submit alternative expediting proposals regarding the timing of discovery that would facilitate the prompt resolution of formal complaints.

10 We have, in the past, sought to expedite resolution of the basic issue of liability and, accordingly, exercised our discretion to bifurcate formal complaint proceedings, holding in abeyance issues involving damages until liability has been established. We would, in any event, retain discretion to conduct such bifurcated proceedings. In particular, while not done routinely, the Commission retains the authority to designate appropriate cases for evidentiary hearing before Administrative Law Judges after liability has been decided.

days of service, rather than the current 30 days. Any objection to the breadth of discovery would have to be made within 10 days of service rather than within the 30 days currently allowed for all objections to discovery. Objections based on attorney/client or other similar, legally recognized privileges could be raised at the time answers are due as is currently the case. We propose to cut the number of days available to file motions to compel answers and/or production from 15 to five. All objections to discovery would be resolved by the Commission staff at a status conference and promptly memorialized in writing and served on the parties. In the event an objection is overruled, answers to interrogatories or requested documents would be due within 10 days from the date of the status conference. These changes should provide for more prompt resolution of discovery while continuing to ensure the development of a complete record.

15. We also seek comment on whether issues regarding relevance should continue to be grounds for opposing an interrogatory or document request. One possible change to our current framework governing discovery could be to preclude objections to discovery based on relevance. Under such an approach, refusal to answer an interrogatory or an objection based on relevance would be deemed an admission of allegations contained in the interrogatory. However, such an admission would only be relevant for the purposes of resolving the complaint. In this manner, a respondent would likely have strong incentives to answer all arguably pertinent questions, yet presumably would not suffer for failing to answer a clearly irrelevant question. We ask commenters to address whether such an approach would facilitate the discovery process without adversely affecting the parties.

16. We also propose to add rules providing for the confidential treatment of proprietary information provided in formal complaint proceedings. In the discovery process, the question of confidentiality of discovered proprietary information often gives rise to significant delays as parties attempt to reach confidentiality agreements. Therefore, we propose a rule to mitigate such delays. The Commission explicitly declined to take such action when the formal complaints rules were last modified. 1988 Formal Complaints Rules Revisions, 3 FCC Rcd 1806, 1811. At that time, the Commission noted that parties concerned about protecting proprietary information filed with the Commission could request, pursuant to Section 0.459 of the rules,<sup>11</sup> that such materials be held in confidence. In addition, the Commission observed that parties may negotiate protective agreements between themselves or move for the imposition of a protective order applicable to any materials to be exchanged. Having observed and participated in the process by which such private protective arrangements are produced and implemented, we have concluded that formal complaints proceedings might be expedited by introducing a rule limiting the disclosure of sensitive materials to and by the parties.<sup>12</sup> We have modeled the proposed

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11 47 C.F.R. § 0.459.

12 In some instances, completion of discovery has been delayed by a year or more while parties resolved concerns regarding the treatment of proprietary material to be produced through discovery.



provisions on protective agreements entered in past cases. Accordingly, we propose to incorporate in our rules provisions specifying the manner in which proprietary materials produced to an opposing party may be used, duplicated and disseminated.<sup>13</sup> These protections would be applied to all materials that a party believes in good faith to fall within an exemption to disclosure contained in the Freedom of Information Act, 5 U.S.C. § 552.<sup>14</sup> We seek comment on this proposal and encourage commenters to submit alternative expediting proposals regarding the issue of confidentiality in the discovery process.

17. We also propose to modify our rules so that answers to interrogatories and documents produced through discovery are not routinely filed with the Commission. Such action in many instances would eliminate the need to seek a confidentiality ruling under Section 0.459, since that provision applies only to materials held by the Commission. Discovered information that is deemed by the parties to be of decisional significance could be included in briefs submitted to the Commission. Confidential treatment by the Commission could then be sought for what would certainly be a more limited amount of data. We are proposing that parties be required to file two versions of briefs - a version available for public inspection which has been edited to remove all information claimed to be confidential, and a complete confidential version filed under seal. We seek comment on this proposal, and request commenters to address other ways the Commission might efficiently administer the filing of briefs containing confidential information.

18. The proposed expedited discovery schedule and consolidated framework should significantly improve the processing for formal complaints without imposing new major burdens on the parties or the Commission staff. We believe the changes are necessary to reduce any incentive to use the discovery process as a delaying tactic or procedural ploy. Discovery delays should be significantly diminished by our proposals to incorporate confidentiality provisions into the formal complaints rules, to provide for verbal staff rulings at status conferences, and to bifurcate discovery so that damages are not addressed until after liability has been established. We believe the proposed rules strike an appropriate balance between the

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13 Specifically, we are proposing that: proprietary materials could only be viewed by certain individuals employed by the recipient; duplication would be restricted and the recipient would be required to maintain a log recording all the production and distribution of all copies made; upon termination of the complaint proceeding all copies of the proprietary materials and related logs would be provided to the producing party; and any notes or work product based on proprietary material would be destroyed.

14 We recognize that there are certain to be disputes as to whether particular materials merit protection. We expect parties to be reasonable in claiming proprietary status, but are prepared to intervene and deliver rulings in status conferences regarding the designation of specific records or categories of records.

sometimes competing interests in promoting the progress of complaint actions before the Commission, protecting the interests of the parties, and ensuring that an adequate record is compiled for Commission resolution.

19. In both the Report and Order adopting the 1988 formal complaints rule revisions and the initiating Notice of Proposed Rulemaking, the Commission recognized that the discovery process is, by nature, susceptible to delaying tactics and procedural manipulation. Accordingly, the Commission indicated that formal complaint discovery would be monitored to limit such abuses. 1988 Formal Complaints Rules Revision, 3 FCC Rcd 1806, 1809; Amendment of Rules Governing Procedures to be Followed Where Formal Complaints Are Filed Against Common Carriers, Notice of Proposed Rulemaking, 2 FCC Rcd 90 (1987). Almost four years of experience with the current discovery structure has convinced us that it should be refined to emphasize incentives for compliance and expedition. We believe the modifications we are proposing work to that end and increase the likelihood that discovery will be an effective tool to develop a factual record for resolution rather than the procedural morass it has increasingly become.

#### PROCEDURAL MATTERS

##### Ex Parte Rules - Non-restricted Proceeding

20. This is a non-restricted notice and comment rulemaking proceeding. Ex parte presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission rules. See generally 47 C.F.R. §§ 1.1202, 1.1203, and 1.1206(a).

##### Regulatory Flexibility Act

21. We certify that the Regulatory Flexibility Act of 1980 does not apply to this rulemaking proceeding because if the proposed rule amendments are promulgated, there will not be a significant economic impact on a substantial number of small business entities, as defined by Section 601(3) of the Regulatory Flexibility Act. Although the proposed rules change the timing and mechanics of the formal complaints process, they would not alter the level of evidentiary and legal support required of parties to such actions. In fact, the proposed rules would eliminate certain pleading opportunities now permitted. The Secretary shall send a copy of this Notice of Proposed Rulemaking, including the certification, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act. See 5 U.S.C. § 601, et seq.

#### CONCLUSION

22. In this Notice, we have outlined our proposals for modifying our rules pertaining to formal complaints against common carriers. We have proposed, for example, to cut the times allowed for the filing of certain pleadings, restrict the time period during which motions may be filed, and tighten discovery provisions by prohibiting discovery regarding damages until after liability has been established. We request comments on the issues and proposals addressed in this Notice and the attached Appendix, and encourage

full participation of parties to formal complaints actions and their legal representatives.

23. Accordingly, pursuant to Sections 1, 4(i), 201(b), 208 and 403 of the Communications Act, 47 U.S.C. §§ 151, 154(i), 201(b), 208 and 403, a NOTICE OF PROPOSED RULEMAKING IS ISSUED, proposing amendment of 47 C.F.R. § 1.720 et seq. as set forth in the Appendix.

24. Pursuant to Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. § 1.415, 1.419, all interested parties may file comments on the matters discussed in this Notice and on the proposed rules contained in the Appendix by April 21, 1992. Reply comments are due by May 11, 1992. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments, and supporting comments. If participants wish each Commissioner to have a personal copy of their comments, an original plus nine copies must be filed. Comments and reply comments should be sent to the Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room (Room 203) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy  
Secretary

## APPENDIX

### PROPOSED RULE CHANGES

Part 1 of Title 47 of the Code of Federal Regulations is proposed to be amended as follows:

1. The authority citation for Part 1 continues to read as follows:

Authority: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303; Implement, 5 U.S.C. 552, unless otherwise noted.

2. In § 1.720, paragraph (i) is added to read as follows:

#### § 1.720 General pleading requirements.

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(i) All statements purporting to summarize or explain Commission orders or policies must cite, in standard legal form, the Commission ruling upon which such statements are based.

3. In § 1.724, paragraph (a) is revised to read as follows:

#### § 1.724 Answers.

(a) Any carrier upon which a copy of a formal complaint, supplemental complaint, amended complaint or cross complaint is served under this subpart shall answer within 20 days of service of the pleading to which the answer is made, unless otherwise directed by the Commission.

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4. Section 1.726 is revised to read as follows:

#### § 1.726 Replies.

Within 10 days after service of an answer containing affirmative defenses that are factually different from any denials also contained therein, a complainant may file and serve a reply which shall be responsive to only those allegations contained in affirmative defenses. Failure to reply will be deemed an admission of such allegations.

5. In § 1.727, paragraphs (b) and (e) are removed; paragraphs (c) and (d) are redesignated and republished as paragraphs (e) and (f), respectively; and new paragraphs (b), (c), (d) and (g) are added to read as follows:

#### § 1.727 Motions.

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(b) Motions shall not be filed before submission of an answer except when a complainant, either by itself or jointly with a defendant, moves for dismissal.

(c) A motion by a defendant that allegations in a complaint be made more definite and certain may be filed with the answer to the complaint which must, nonetheless, respond to those allegations that reasonably can be addressed.

(d) A motion by a defendant for summary judgment or dismissal may be filed with the answer to the complaint. No such motions will be accepted after the deadline for filing an answer unless the motion is based upon information discovered after the pleading deadline and clearly so states, identifying the particular information and the occasion of its discovery.

(e) Where the matter involved in the motion is one of procedure or discovery, the moving party shall provide a proposed order for adoption, which appropriately incorporates the basis therefor.

(f) A party opposing any motion concerning procedure or discovery shall also provide a proposed order for adoption, which appropriately incorporates the basis therefor.

(g) Oppositions to motions may be filed within ten days after the motion is filed. Oppositions shall be limited to the specific issues and allegations contained in the motion; when a motion is incorporated in an answer to a complaint, an opposition to the motion shall not address any issues presented in the answer that are not also specifically raised in the motion.

6. In § 1.729, paragraph (a) is revised to read as follows; paragraphs (b), (c), and (d) are revised to read as follows and redesignated as paragraphs (d), (e), and (g), respectively; and new paragraphs (b), (c), and (f) are added to read as follows:

**§ 1.729 Interrogatories to parties.**

(a) During the time period beginning with the date an answer to a complaint is due and ending 20 days after such date, any party may serve any other party written interrogatories, to be answered in writing by the party served or, if the party served is a public or private corporation or partnership or association, by any officer or agent who shall furnish such information as is available to the party. Parties shall propound no more than 30 single interrogatories without prior Commission approval. Subparts of an interrogatory will be counted as separate interrogatories for purposes of compliance with this limit. All interrogatories served on an opposing party shall be filed with the Commission at the time of service.

(b) Unless otherwise directed by the staff, no discovery pertaining to damages will be authorized until the Commission or its staff has issued a decision on the merits of a complaint or cross-complaint in favor of the complainant.

(c) Any objection to the breadth of an interrogatory shall be made within 10 days after service of the interrogatory. Other objections based on legally recognized grounds (e.g. attorney-client) may be submitted in lieu of an answer.

(d) Parties on whom interrogatories are served shall respond without waiting to be ordered to do so by the Commission. Each interrogatory shall be answered separately and fully in writing under oath or affirmation, unless it is objected to, in which event the reasons for objection shall be submitted in accordance with subsection (c), above. The answers shall be signed by the person making them. The party on whom the interrogatories were served shall serve a copy of the answers and objections, if any, within 20 days after service of the interrogatories. Failure to answer or an evasive answer will be deemed an admission for purposes of resolving the complaint.

(e) Where the responding party has failed to respond, or has objected, to any interrogatory, the party propounding the interrogatories may, within 5 days of the date the response was due if no response is filed or the date of service of the objection, move to compel a response thereto.

(f) Objections will be resolved by Commission staff at a status conference. Such rulings will be promptly memorialized in writing and served on the parties. In the event an objection is overruled by the Commission staff, the respondent shall serve the requested materials on the movant within 10 days from the date of the status conference or within 20 days after service of the interrogatories, whichever period is longer.

(g) Answers to interrogatories shall not be filed with the Commission unless so ordered by the Commission or its staff.

7. In § 1.730, paragraph (c) is revised to read as follows and paragraph (d) is added to read as follows:

**§ 1.730 Other forms of discovery.**

\* \* \* \* \*

(c) Motions seeking discovery beyond the 30 single interrogatories permitted under § 1.729 may be filed during the period beginning with the date an answer to a complaint is due and ending 20 days after such date, except where the movant demonstrates that the need for such discovery could not, even with due diligence, have been ascertained within this period.

(d) Documents produced through discovery shall not be filed with the Commission unless so ordered by the Commission or its staff.

8. Sections 1.731 through 1.734 are redesignated as §§ 1.732 through 1.735.

9. New § 1.731 is added to read as follows:

**§ 1.730 Confidentiality of information produced through discovery.**

(a) Any materials generated or provided by a party in response to discovery may be designated as proprietary by that party if the party believes in good faith that the materials fall within an exemption to disclosure contained in the Freedom of Information Act, 5 U.S.C. § 552(b)(1) - (9). Any party asserting confidentiality for such materials shall so indicate by clearly

marking each page, or portion thereof, for which a proprietary designation is claimed.

(b) Materials marked as proprietary may be disclosed solely to the following parties and only to the extent necessary to assist in the prosecution or defense of the complaint action:

(1) Counsel of record representing the parties in the complaint action and any support personnel employed by such attorneys;

(2) Officers or employees of the opposing party;

(3) Consultants or expert witnesses retained by the parties;

(4) The Commission and its staff;

(5) Court reporters and stenographers in accordance with the terms and conditions of this section; and

(6) Persons employed by the party or third party that generated the material designated as proprietary.

These individuals shall not disclose information designated as proprietary to any person who is not authorized under this section to receive such information.

(c) No copies of materials marked proprietary may be made except working copies to be used by persons designated in subsection (b), above. Each party shall maintain a log recording the number of copies made of all proprietary material and the persons to whom the copies have been provided.

(d) Upon final termination of a formal complaint proceeding, including all appeals and petitions, all originals and reproductions of any proprietary materials, along with the log of persons who received copies of such materials, shall be provided to the producing party. In addition, upon final termination of the complaint proceeding, any notes or other work product derived in whole or in part from the proprietary materials of an opposing or third party shall be destroyed.

10. In newly redesignated § 1.732, paragraph (b) is redesignated and republished as paragraph (f); and new paragraphs (b), (c), (d), and (e) are added to read as follows:

**§ 1.732 Other required written submissions.**

**\* \* \* \* \***

(b) In cases where discovery is not conducted, briefs shall be filed concurrently by both complainant and defendant within 15 days from the date the Commission or its staff orders submission of such a pleading. Briefs shall be no longer than 25 pages, unless otherwise ordered.

(c) In cases where discovery is conducted, initial briefs shall be filed concurrently by both complainant and defendant within 20 days from the date the Commission or its staff orders submission of such a pleading. Initial briefs shall be no longer than 35 pages, unless otherwise ordered.

(d) Reply briefs may be filed only in cases where discovery is conducted. Reply briefs may be submitted by either party within 10 days from the filing deadline for initial briefs. Reply briefs shall be no longer than 20 pages, unless otherwise ordered.

(e) Briefs containing information which is claimed by an opposing or third party to be proprietary under § 1.731 shall be submitted to the Commission in confidence pursuant to the requirements of Section 0.459 and clearly marked "Not for Public Inspection." An edited version removing all references to proprietary data shall also be filed with the Commission for inclusion in the public file.

(f) The Commission may require the parties to submit any additional information it deems appropriate for a full, fair, and expeditious resolution of the proceeding, including affidavits and exhibits.

11. In newly redesignated § 1.733, paragraph (a) introductory text is republished; paragraphs (a)(5) and (b) are revised to read as follows; paragraphs (c) and (d) are redesignated and republished as paragraphs (d) and (e), respectively; and new paragraph (c) is added to read as follows:

**§ 1.733 Status conference.**

(a) In any complaint proceeding, the Commission may in its discretion direct the attorneys and/or the parties to appear before it for a conference to consider:

\* \* \* \* \*

(5) The necessity and extent of discovery, including objections to interrogatories or requests for production of documents;

\* \* \* \* \*

(b) While a conference normally will be scheduled after the answer has been filed, any party may request that a conference be held at any time after the complaint has been filed.

(c) During a status conference the staff may issue rulings pertaining to a variety of interlocutory matters relevant to the conduct of a formal complaint proceeding including, inter alia, procedural motions, discovery, and the submission of briefs or other evidentiary materials. These rulings will be promptly memorialized in writing and served on the parties. However, all rulings are effective immediately upon issuance at the conference.

(d) Conferences will be scheduled by the Commission at such time and place as it may designate, to be conducted in person or by telephone conference call.



(e) The failure of any attorney or party, following reasonable notice, to appear at a scheduled conference will be deemed a waiver and will not prevent the Commission from conferring with those parties or counsel present.

12. In newly redesignated § 1.735, paragraph (b) is revised to read as follows:

**§ 1.735 Copies; service; separate filings against multiple defendants.**

**\* \* \* \* \***

(b) The complainant must file an original plus three copies of the complaint, accompanied by the correct fee, in accordance with Subpart G of this Part of the Rules. See 47 C.F.R. § 1.1105(1)(c). However, if a complaint is addressed against multiple defendants, complainant shall pay separate fee and supply three additional copies of the complaint for each additional defendant.

**\* \* \* \* \***

**SEPARATE STATEMENT  
OF  
COMMISSIONER ANDREW C. BARRETT**

**In Re: Amendment of Rules Governing Procedures to be Followed  
When Formal Complaints are Filed Against Common Carriers**

I support this Notice of Proposed Rulemaking that seeks comment on proposed modifications to the Commission's formal complaint rules. Our intent here is to make the process more efficient which should aid in earlier resolution of complaints. To this end, I will be interested in the problems faced by complainants and common carriers in complying with our existing rules. I am hopeful we can receive well thought out comments on how to make the process user friendly, efficient, and timely.

I understand the perceived burdens that our proposed rule modifications may place on complainants, but I believe that the potential time and energy savings for complainants, common carriers and the public ultimately may outweigh these burdens. In this regard, I believe our proposed rules will encourage those practicing before the Commission to file more thorough and concise statements. Finally, while I believe this Notice provides a valuable framework for discussion of ways to improve the formal complaint process, I will be interested in any comments regarding "genuine" harm to the rights of the customers in terms of the proposed rule modifications.